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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RAYMOND VANCE,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

RICHARD WURTELE,

Real Party in Interest.

D054329

(San Diego County Super. Ct.
No. 37-2007-00081570-CU-PA-CTL)

PROCEEDINGS in mandate after superior court granted motion to compel
production. Jay M. Bloom, Judge. Petition granted.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Richard Wurtele filed suit against defendants Michael and Janet
Castaños. Defense counsel retained orthopedic surgeon Raymond Vance to perform an
independent medical examination on plaintiff and serve as an expert. Plaintiff noticed

Dr. Vance's deposition and requested documents including the doctor's medical office appointment book. Dr. Vance was deposed on September 10, 2008, but refused to produce his appointment book on grounds that production would violate his right to privacy and the right to privacy of patients not involved in the litigation.

Two months after the deposition, plaintiff filed a motion to compel production of the appointment book (with patient names redacted) and requested costs and fees, but did not serve the notice of motion or moving papers on Dr. Vance. Defense counsel filed a declaration in "response" to the motion describing certain events and stating that his office had no control over the doctor's appointment book, but did not oppose the motion to compel or serve his responsive declaration on Dr. Vance. On December 12 the court issued an order granting the "unopposed" motion to compel, denying sanctions, and directing the doctor to produce the appointment book by December 31. Dr. Vance learned about the motion, the hearing and the ruling only after the court had decided the matter.

Dr. Vance followed with this petition. He asserts, as a nonparty deponent, he was entitled to notice of the motion and service of the moving papers, and the lack of notice or service violated due process and prevented him from opposing the motion. Noting that state and federal law (including the Health Insurance Portability and Accountability Act of 1996 [42 U.S.C. § 1301 et seq.]) requires him to safeguard his patients' personal and medical information, the doctor argues name redaction alone is insufficient to protect his patients' privacy because the appointment book contains other entries that may include the reason for the appointment, the medical procedure the patient is scheduled to

undergo, the name of the assisting physician, and the patient's phone number. We requested responses from plaintiff and defendants, and issued *Palma* notice. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

DISCUSSION

Code of Civil Procedure section 2025.480, subdivision (c), requires a party who is filing a motion to compel production of tangible things under the deponent's control to give the deponent notice of the motion orally at the deposition¹ or by subsequent service in writing. Rule 3.1346 of the California Rules of Court requires personal service of the written notice of motion and all supporting papers on the nonparty deponent unless the deponent agrees to service by mail at an address specified on the deposition record.

Plaintiff counters that Dr. Vance may have heard about the motion after it was filed and the doctor has no legitimate privacy claims, but does not dispute that he failed to give the doctor the oral or written notice required by statute or serve him in any manner, personally or by mail. Never having been noticed or served, the doctor was prevented from properly presenting his concerns about his and his patients' privacy to the court.

Because the issue presents a case of temporal urgency requiring acceleration of the normal process,² the relevant facts are not in dispute, the law is straightforward, and the

¹ If notice is given orally, the statute requires "the deposition officer [to] direct the deponent to attend a session of the court at the time specified in the notice." (Code Civ. Proc., §2025.480, subd. (c).)

² The record reflects that trial is scheduled to start on January 16, 2009.

doctor's entitlement to relief is clear, we conclude a peremptory writ in the first instance is proper. (Code Civ. Proc., § 1088; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1222-1223, disapproved on another ground in *Hassan v. Mercy American River Hosp.* (2003) 31 Cal.4th 709, 724, fn. 4; *Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.)

DISPOSITION

Let a peremptory writ of mandate issue directing the superior court to vacate its December 12, 2008 order granting the motion to compel, and reconsider the motion once it has been properly noticed and served on the doctor. Dr. Vance is entitled to costs in the writ proceeding. This opinion is made final immediately as to this court. (Cal. Rules of Court, rule 8.490(b)(3).) The stay issued December 30, 2008, is VACATED.

BENKE, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.